United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-2388

To be argued by
DAVID R. HYDE

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RAYMOND E. KARLINSKY, HOWARD JACOBSON, and HORSEMEN'S BENEVOLENT AND PROTECTIVE ASSOCIATION, INC., on behalf of themselves and all others engaged in the business of owning, training and racing thoroughbred horses in the United States, who are similarly situated,

Plaintiffs-Appellants,

—against—

THE NEW YORK RACING ASSOCIATION, INC., JOCKEY CLUB, JOHN C. CLARK, JACK J. DREYFUS, JR., JOHN G. GALBREATH, FRANK M. BASIL, G. H. BOSTWICK, JOHN W. HAMES, FRANCIS KERNAN, ROBERT J. KLEBERG, JR., JOHN A. MORRIS, PERRY R. PEASE, ODGEN PHIPPS, JOHN M. SCHIFF, ALFRED G. VANDERBILT, JOSEPH WALKER, JR., AND JOHN H. WHITNEY,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANTS-APPELLEES

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This appeal involves what may well be one of the most frivolous "antitrust" actions ever to consume the time of the District Court or of this Court. After some five years of proceedings below (not to mention related actions in the state courts) virtually the only thing to have been established is that some horses run faster than other horses and that some horsemen own more of one kind than the other kind of horse.

The appeal is taken from a judgment entered in the United States District Court for the Southern District of New York on September 16, 1974, by Hon. Whitman Knapp dismissing plaintiffs' Amended Complaint. At the conclusion of a four-day non-jury trial before him in July 1974, at which he had heard the testimony of some ten witnesses, all of them called by plaintiffs, Judge Knapp orally rendered tentative findings and conclusions in favor of defendants, ending with the observation:

> "So all you have established is that Jockey Club members have faster horses and get more prizes, and I do not see how you can hold these defendants responsible for that result." (526a)

Nevertheless, Judge Knapp gave plaintiffs until September to submit any papers they wished in order to persuade him otherwise.* No papers were filed and on September 16, 1974 judgment was entered formally adopting Judge Knapp's oral findings and conclusions, and ordering dismissal of the Amended Complaint. This appeal followed.

Issues Presented

Ignoring Rule 28(a) F.R.A.P., appellants' brief makes no effort to define "the issues presented for review". Indeed, it would appear that what appellants really seek is to retry their case in this Court. Thus, appellants' brief proceeds as though no trial had ever taken place and this Court had before it only the untried allegations of a complaint.

This being so, it is difficult if not impossible for appellees to say what issues are presented for review. Despite ap-

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* Judge Knapp pointed out that the last time he had rendered tentative findings and conclusions at the close of trial, he had changed his mind and reached a contrary result after studying the briefs subsequently submitted to him.

pellants' somewhat copious sprinkling of quotations from landmark antitrust opinions throughout their brief, no issue of law emerges. It is hard even to discern what section of the Sherman Act is alleged to have been violated. Nor are there any evidentiary questions. Judge Knapp excluded no evidence whatever and gave appellants every opportunity to prove their case. When all is said and done then, the only issue that can be formulated would appear to be:

> Did the plaintiffs below prove any Sherman Act violation by the defendants?

The Parties

The Plaintiffs

This action is brought by the Horsemen's Benevolent and Protective Association ("HBPA"), alleged to be a non-profit Rhode Island membership corporation whose members are owners and trainers of thoroughbred horses engaged in the sport of thoroughbred racing.* (15a) In addition, there were originally three individual plaintiffs: Raymond E. Karlinsky, Howard Jacobson and Harry M. Hatcher,** who, according to the amended complaint:

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* Defendants made a formal motion, returnable at the opening of trial, to dismiss as to plaintiff HBPA on the authority of this Court's recent decision in *Nassau County Ass'n of Insurance Agents, Inc.* v. *Aetna Life & Cas. Co.*, 497 F.2d 1151 (2d Cir. 1974) (holding that a membership association lacked standing to assert claims on behalf of its members). Judge Knapp, who reserved judgment on the motion, did not find it necessary to decide the issue.

** Shortly after the filing of the Original Complaint (which was subsequently dismissed by Judge MacMahon, see pp. 11-12, *infra*), defendants served a notice of Mr. Hatcher's deposition. Two additional notices were served, one in 1971 and the other in 1973. Mr. Hatcher never appeared in response to any of these notices. At various times plaintiffs' attorney asserted that Mr.

> "... have been and are owners and trainers of thoroughbred horses which race in various parts of the United States, who are licensed in various states to engage in such activity and race their horses in numerous states in the eastern part of the United States, including the State of New York." (15a)

Karlinsky is a former officer of the HBPA who raced horses throughout the country until 1970 when he stopped racing partly "because I had federal troubles with the Securities and Exchange Commission" (434a). Jacobson was President of the New York Division of the HBPA at the time this action was filed.

The Defendants

The original defendants were The New York Racing Association Inc. ("NYRA"), The Jockey Club, The Thoroughbred Owners & Breeders Association, Inc., Record Publishing Company, Inc. and 21 individual defendants. The latter consisted of NYRA's President and its 20 trustees at the time the complaint was filed.* A more

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Hatcher was "no longer in the lawsuit" and that he had "changed his mind." Mr. Hatcher's status was finally resolved on the first day of trial when Judge Knapp granted defendants' oral motion to dismiss the complaint as to Mr. Hatcher (75a).

* Little, if any, evidence was introduced at trial with respect to most of the individual defendants or The Jockey Club. Between the time of the filing of the complaint and the trial five years later, 6 individual defendants died, the appropriate Suggestions of Death were filed and their names no longer appear in the caption of this action. Since the trial, two more individual defendants, John C. Clark and Robert J. Kleberg, Jr., have died, thereby leaving 13 living individual defendants. The Thoroughbred Owners & Breeders Association, Inc. and Record Publishing Company, Inc. were dismissed as defendants by order of Judge Lasker, March 23, 1971.

The defendant Frank M. Basil seems to have been named a defendant under the mistaken impression that he was a trustee of NYRA. As a matter of fact, although its president for several years, Mr. Basil was not even chief executive officer of NYRA.

detailed description of the organization and roles of The Jockey Club and NYRA, which owns and operates thoroughbred racing tracks at Aqueduct, Belmont Park and Saratoga, New York is set forth at pages 7-11, *infra.*

The Background of this Action

In order to aid the Court in understanding the reasons why plaintiffs brought and prosecuted this utterly non-meritorious action, we set forth below relevant background information which will suggest the underlying motivation for bringing it.

In late April 1969 the HBPA organized and led a boycott of racing at Aqueduct in protest of the state legislature's failure to enact certain legislation introduced at the behest of the HBPA. The boycott, which caused a complete cessation of racing at Aqueduct, ended nine days later with the issuance of a temporary restraining order by the Supreme Court, New York County. (207a, 527a)*

Thus thwarted in their attempt to influence the legislature by means of a costly boycott, and apparently incensed that NYRA had played a minor role in the state's obtaining the preliminary injunction, on July 24, 1969 the HBPA commenced an action in the Supreme Court, Albany County (*Halpern, et al.* v. *Lomenzo, et al.*, Dkt. No. 5966-69), against NYRA, The Jockey Club, certain racing officials employed by NYRA, and the Secretary of State

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* A preliminary injunction was subsequently issued by Justice Gellinoff on July 7, 1969, *New York* v. *Horsemen's Benevolent Protective Ass'n*, CCH Trade Reg. Rep. ¶ 72,852 (Sup.Ct. N.Y.Co. 1969). Justice Gellinoff's ruling was unanimously affirmed by the Appellate Division, First Department without opinion on February 10, 1970. A trial was held before Justice Stecher on the Attorney General's request for permanent injunction, after which Justice Stecher denied the Attorney General's request and dismissed the Complaint on June 25, 1974 (N.Y.L.J. 6/28/74, p. 13, Col. 3). The decision is being appealed.

and State Racing Commission of New York. The complaint sought a judgment declaring the New York Racing Laws and Rules of Racing unconstitutional insofar as they authorize privately incorporated racing associations such as NYRA, rather than the state, to conduct thoroughbred racing and to appoint various racing officials including two of the three stewards who are in overall charge of the races. The complaint alleged that the "unlawful delegation of powers" had led to certain abuses, specifically the fact that trustees of NYRA and stewards of The Jockey Club owned and raced horses under the supervision of officials appointed by themselves and that trustees of the NYRA were "accorded preferred treatment by the officials above described in the allocation of stall space and the rules applicable thereto, in the programming of races so as to give them better racing opportunities, in the purses paid for races in which they engage, and in the nature of the racing programs offered." The action was transferred to Supreme Court, New York County (Index No. 26421/71), where an eight-day trial was concluded on November 14, 1973. No decision has yet been rendered in that case.*

While faced with a pending motion to dismiss its state court action, the HBPA filed this action on September 18, 1969, seeking an injunction and treble damages under the federal antitrust laws. Interestingly, the specific charges set forth in the original and amended complaints in this action, are essentially the same as those alleged in the

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* Still another court action against NYRA was commenced, this one by Mr. Jacobson, one of the individual plaintiffs here. Although his complaint, which sought $8,000,000 in damages for malicious denial of stall space was upheld by the New York Court of Appeals, *Jacobson* v. *New York Racing Ass'n,* 33 N.Y.2d 144, 305 N.E.2d 765, 350 N.Y.S.2d 639 (1973), when the action was tried the jury found unanimously in favor of defendant NYRA. (Supreme Court, Nassau County, June 25, 1974, No. 8669/71).

state court action, revolving around the fact that trustees of NYRA themselves own and race horses, and that they allegedly "abuse" their power in the allocation of stall space, the arrangement of annual purse schedules, and the allocation of purse monies to special features, invitationals and stake races (24a-30a).

That this action was not brought in good faith, but solely to advance HBPA's ulterior objectives, is amply evidenced by the following excerpt from The Horsemen's Journal, the official publication of the HBPA:

> "[A]lthough some people have been quick to blame the HBPA for encouraging trouble, we would point out that the HBPA has always operated in good faith, and has endeavored to face the realities of racing and to do something about them.
>
> "And what has it gotten for its efforts? Lawsuits of dubious nature in California and New York, as well as harassment. In New York, the New York Racing Association, acting as *amicus curiae* (friend of the court) joined the Attorney General in his suit for a temporary injunction against the HBPA. *This in turn has caused the HBPA to reassess its position in terms of aggressiveness.* . . . [T]he legal exposure [of the NYRA] will be crystallized in the near future." ("President's Letter", *The Horsemen's Journal,* July 1969) (emphasis added).

It can be no coincidence that this action was filed some two months later.

The Roles of The Jockey Club and NYRA in Thoroughbred Racing

The Jockey Club is a New York corporation which was organized just prior to the turn of the century (151a). The Jockey Club is a membership-type corporation; it has

no capital stock, corporate shares or certificates of ownership of any kind. It has approximately 75 members, many of whom own or race thoroughbred horses. Membership is not transferable. Its affairs are managed by nine directors called stewards who are elected for four-year terms. They receive no compensation.

The income of The Jockey Club is derived from membership initiation fees and dues, registration fees and proceeds from the sale of certain publications. The Jockey Club publishes the American Stud Book, which is an accurate and complete source of information regarding blood lines and pedigrees of thoroughbred horses (143a). The Jockey Club also issues publications which contain information such as the names of horses, partnerships, arrangements for the leasing of horses, and registered stable names and colors (144a-149a).

The New York State Racing Commission recognizes The Jockey Club as the repository of records pertaining to the registration of thoroughbred horses in the State of New York, 19 N.Y.C.R.R. § 24.1. It also serves a similar function in other states where thoroughbred racing is conducted.*

The New York Racing Association Inc. (which, unlike The Jockey Club, functions solely in the State of New

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* *E.g.*, Florida (Admin. Code, Ch. 7 E-1; Sec. 7 E-1.24); Delaware (Racing Law, Title 28, Ch. 3, § 326); New Jersey (Rules, N.J. Racing Comm'n §§ 6.12; 6.13); California (Admin. Code, Title 4, Ch. 4, § 1588); Maryland (Rules of Racing, § 09.10.08); Illinois (Rules and Regulations of Horse Racing, Rule 161); Ohio (Rules of Racing, RC 7-30); Louisiana (Rules of Racing, Rule 11(g)(h) and (j)); Massachusetts (Rules of Horse Racing, Rule 177); Maine (Rules of Horse Racing, Rules 155-156); Pennsylvania (Rules of Racing, §§ b.11 and b.12); Arizona (Horse Racing Rules and Regulations, Rule 6.02); Arkansas (Rules and Regulations Governing Horse Racing, § 2223); Colorado (Rules Governing Horse Racing § 8.07). There are many other similar rules that could be cited.

York) is a New York corporation which was organized in 1955 under the general enabling provisions of § 7902 of Title 21 of the Unconsolidated Laws of the State of New York (McKinney 1961) (191a). That Section provides, in part:

> "§ 7902. Incorporation of non-profit racing associations
>
> "Non-profit racing associations may be incorporated under this chapter for the purpose of conducting races and race meetings, improving the racing facilities, increasing the conveniences available to patrons and serving the best interest of racing generally and improving the breed of horses."

Section 7902 does not specifically mention NYRA or any other organization, and there is nothing in it or any other section of the Unconsolidated Laws that would preclude the organization by private individuals of other non-profit racing associations.

NYRA has 20 directors who are known as trustees (the trustees at the time the complaint was filed were all named as defendants herein) and who are also the sole stockholders of the corporation (193a). The trustees serve without compensation. Persons nominated to fill vacancies on the Board of Trustees must be approved by the State Racing Commission. (Unconsol. Laws § 7902(3)). Moreover, the Commission may dismiss a trustee for misconduct *(ibid)*. The assets of the NYRA cannot be distributed by way of dividend on its capital stock, in liquidation or otherwise (*Id.* § 7902(1)). The income of the NYRA is derived principally from charges for admission to its racetracks, a share in the amounts wagered thereat, and fees paid to it by restaurant, parking and other concessions. Profits, if any, are reinvested in track facilities or used to service long-term debt (194a).

Pursuant to a 25-year franchise granted by the New York State Racing Commission (Unconsol. Laws § 7910), NYRA owns and operates the physical facilities of Aqueduct, Belmont Park and Saratoga racetracks in New York (196a). Two aspects of NYRA's operations are closely supervised by the New York State government, pari-mutuel betting and the running of the races.

Pursuant to Unconsolidated Laws, Title 21, § 7908, the State Racing Commission* is empowered "to supervise generally" race meetings which it authorizes racing associations, including NYRA, "to conduct" (§ 7902). The State Racing Commission's Rules and Regulations, *inter alia,* prescribe the duties of the personnel employed by the racing associations to conduct the races. Of the three stewards who have general supervision over all other racing personnel, one each is appointed by NYRA, The Jockey Club and the State Racing Commission (Unconsol. Laws Title 21 § 7914). The stewards appointed by the NYRA and The Jockey Club, as well as all other racing officials who are employed by NYRA, must be approved by the Commission. Officials, such as the placing judges, patrol judges and the clerk of scales, are answerable in the first instance only to the stewards (*see, e.g.,* Sections 22.11, 22.16, 23.2 of the Commissions' Rules, 19 N.Y.C.R.R. Ch. 1) and ultimately to the State Racing Commission (Section 22.16), from whose determinations judicial review may be had under Article 78 of the New York Civil Practice Law and Rules.

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* Chapter 346 of the Laws of 1973 has transferred the powers of the State Racing Commission to a new State Racing and Wagering Board (Unconsol. Laws § 8162). The nature and extent of these powers were unaffected by the transfer. The Racing Commission is retained by the new law as a purely advisory body (Unconsol. Laws § 8164).

Although NYRA operates the three major New York racetracks, there is one additional thoroughbred racing association in New York, the Finger Lakes Racing Association, Inc., which in 1973 held 169 days of racing, had attendance in excess of 600,000 and pari-mutuel pools of over $51,000,000. 1973 Annual Report, New York State Racing and Wagering Board, p. 6.

As indicated above, the function of NYRA, like that of other racing associations and tracks, is limited to conducting races and the pari-mutuel betting thereon. The horses which race at NYRA's facilities are owned and trained by private individuals or partnerships, which can own anything from a single horse to a world-renowned "stable" of horses.* The owners and trainers retain and employ necessary personnel to care for, train and run their horses. While racing at NYRA's facilities all horse owners and trainers are provided with stable space on the grounds free of charge, subject to space limitations (66a, 160a, 162a).

Proceedings Below

The Original Complaint was filed September 18, 1969. In it plaintiffs purported to charge defendants with violations of Sections 1 and 2 of the Sherman Act and in addition, plaintiffs sought relief under the Robinson-Patman Act.

Defendants moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim for relief. Judge MacMahon granted the motion, dismissing the Robinson-Patman Act claim as-

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* Like other horsemen generally, the trustees and Jockey Club members race a widely varying number of horses. Some Jockey Club members do not race the thoroughbred racehorses they own, but rather confine their activities to breeding (312a).

serted therein without leave to amend, and granting plaintiffs twenty days in which to file an amended complaint setting forth a "plain and concise claim" under Sections 1 and 2 of the Sherman Act.

As Judge MacMahon found:

> "The complaint in this action utterly fails to set forth a concise statement of the material facts constituting plaintiffs' claim for relief. It is a meandering, disorganized, prolix narrative rather than a plain statement of facts framed with reference to a violation of the federal antitrust laws." (Opinion of MacMahon, J., March 20, 1970, at 4).

Plaintiffs subsequently filed a 26-page amended complaint that (despite the omission of any Robinson-Patman claim, as to which plaintiffs were given no leave to amend) was actually 4 pages longer than, and equally disorganized as, the original. It was sustained by Judge Lasker on March 4, 1971, even though he characterized it as being "less than a model of the pleader's art." 52 F.R.D. 40, 44 (S.D.N.Y. 1971).

As discussed below, on the eve of trial, on March 1, 1974, almost five years after the filing of the Original Complaint, plaintiffs finally moved for class action determination. On April 26, 1974 Judge Knapp denied class action certification on the grounds of inexcusable delay (69a-71a) (see pp. 29-40, *infra*).

Finally, on July 8, 1974 this action came to trial before Judge Knapp sitting without a jury. The trial consumed parts of four days and was finally concluded on July 15. During the course of the trial plaintiffs called 10 witnesses, six of whom were officers or employees of the defendants.

Three of the six were also named as individual defendants. Plaintiffs Jacobson and Hatcher did not testify (see note "**" p. 3, *supra*) and no representative of plaintiff HBPA testified.

At the conclusion of the testimony Judge Knapp orally delivered what he called a "tentative" ruling and findings, stating that he might change his mind after receiving papers, which he gave plaintiffs until September 3 to serve (529a). Plaintiffs submitted nothing, and on September 17, 1974 judgment was entered formally adopting Judge Knapp's oral findings and ruling and dismissing the Amended Complaint (531a).

ARGUMENT

POINT I

There Was a Complete Failure of Proof at Trial of Any Injury to Plaintiffs or of Any Violation of the Antitrust Laws.

As stated earlier in this brief, it is difficult if not impossible to determine with any degree of certainty precisely what theory of the antitrust laws plaintiffs are using as a basis for this appeal. Their theory of the case at the outset was so muddled that their original Complaint was dismissed and their Amended Complaint barely survived dismissal (see p. 12, *supra*). The meandering hodgepodge of allegations contained in the Amended Complaint were never clarified during the long and desultory pre-trial stages of the prosecution of this case.

The first clarification of the issues involved came during the course of the trial when it became clear that plaintiffs

had no intention of even offering any proof with respect to their allegation of the Amended Complaint (28a-29a) concerning defendants' alleged monopolization of breeding stock and denial of access to the best blood lines—an allegation which at least bore some resemblance to the Sherman Act, and which had been alluded to by Judge Lasker in sustaining the Amended Complaint.

As the trial progressed, more and more allegations fell by the wayside due to plaintiffs' utter failure of proof, or even offer of proof, so that by the end of the trial, it was completely clear that there were no real antitrust issues involved in this case. Unfortunately, it took almost five years to reach this ultimate clarification.

Plaintiffs Have Made No Effort to Define the Relevant Market

While plaintiffs never indicate what portions of the Sherman Act they are relying on, their continued use of the word "monopoly" would make it appear that this appeal is directed to Section 2 of the Act.* The threshold question that must be decided in determining a violation of Section 2 is whether monopoly control exists *in the relevant market. United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966). Obviously, to make such a determination the relevant market must be defined and proved, and the burden to do so is on the plaintiff. In the instant case plaintiffs have made absolutely no effort whatsoever to prove or define a relevant market for Sherman Act purposes.

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* In their Pre-Argument Statement, plaintiffs set forth only the following antitrust issue:

"ISSUES PROPOSED TO BE RAISED ON APPEAL:

1. Whether on a substantially conceded set of facts, monopoly control existed and whether its use constituted a violation of the Sherman Act."

In his opinion upholding the Amended Complaint Judge Lasker confessed difficulty in determining what plaintiffs claimed was the relevant market. As Judge Lasker noted, the Amended Complaint contains no allegation as to relevant market, but he found an assertion in plaintiffs' brief that New York was a relevant market and therefore upheld the complaint, with the proviso that "the plaintiffs shall be limited, insofar as proof of relevant market is concerned, to New York State." 52 F.R.D. at 44.

Not only did plaintiffs make no attempt to prove that New York was the relevant market, the allegation in paragraph 15 of their Amended Complaint that plaintiffs' race horses in the "eastern part of the United States" (15a), and testimony given by plaintiff Karlinsky himself that he raced horses not only in New York, but also in New Jersey, New England, Illinois, Maryland, Kentucky and "others [states] that I can't recollect at the moment" (416a) is flatly inconsistent with their unsupported assertion that New York is a relevant market.

At the trial and on this appeal, plaintiffs appear to take it for granted that the Sherman Act automatically segregates the United States into fifty distinct markets, and that all they have to do is talk about New York.* This facile assumption is belied by the fact that thoroughbred racing is conducted in some 30 states throughout the United States, including (with the exception of Connecticut) every state bordering on New York,** and that horses

* As previously noted, even in New York there is one other thoroughbred racetrack, Finger Lakes. Moreover, the enabling legislation under which racing associations may be incorporated contains no barrier or inhibition against the formation of other thoroughbred tracks in New York.

** In addition, the adjoining Canadian Provinces of Quebec and Ontario have thoroughbred race tracks, and NYRA will soon face additional stiff competition from the planned sports complex and racetrack being constructed just across the Hudson in Hackensack, New Jersey.

are regularly shipped from track to track throughout the country to compete (355a). If the United States as a whole is considered the relevant market (and due to the fact that horses are shipped coast-to-coast to race (231a, 310a, 380a) this is by no means an unreasonable definition) then NYRA's percentage of this "market" during the past ten years, in terms of total purse moneys paid to horsemen, runs from a high of 15.7% in 1967 to a low of 11.5% in 1972—percentages hardly indicative of a "monopoly". Even if the "market" were restricted to tracks in states on or adjacent to the Eastern Seaboard, NYRA's share, again in terms of purse moneys paid, ranged from a high of 31.5% in 1967 to a low of 23.2% in 1972 (596a)—again far below any figures that have been held indicative of a "monopoly".

The foregoing is not intended to demonstrate what the relevant market is. That was plaintiffs' burden and was totally ignored. We set forth the above merely to show that plaintiffs' constant reiteration of this word "monopoly" is totally meaningless in the Sherman Act sense—given plaintiffs' complete failure of proof as to this vital element of their cause of action.

Even Assuming *Arguendo* that NYRA Possesses Monopoly Power in the Relevant Market, There Is Absolutely No Evidence of Any Abuses of Monopoly Power Necessary to Sustain an Antitrust Claim

Even assuming *arguendo* that plaintiffs had shown New York to be a relevant market and that defendants possessed monopoly power in such market, it would still be incumbent upon them to prove abuse of such power.

Monopoly power means the power to raise or control prices or to exclude competitors. *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 389 (1956). Since the mere possession of monopoly power does not violate

Section 2, *United States* v. *Swift & Co.*, 286 U.S. 106 (1932), a plaintiff must not only show that the defendants possess monopoly power but must also show that the manner in which such power was used was for the purpose of foreclosing or destroying competition or gaining unfair competitive advantage. *Cf. United States* v. *Griffith*, 334 U.S. 100, 106-107 (1948); *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945).

At the trial plaintiffs did not show that NYRA had any power to raise or control "prices". The short of the matter is that in New York the total amount of purse money paid to horsemen is fixed by statute, currently approximately 3% of the "handle", *i.e.*, the total amount wagered at the track. (Unconsol. Laws §7960(c)). Nor was there any showing that defendants have attempted to exclude competitors. Given plaintiffs' abandonment of the charge that defendants monopolized the breeding of thoroughbred horses by foreclosing access to the best bloodlines (see, *supra*, p. 14), there was no proof that any horseman lacked the opportunity to obtain a horse of the requisite quality and race it at NYRA tracks.

Instead, what plaintiffs' case came down to at trial was a hodge-podge of "gripes" directed at what they considered to be the "racing establishment". Judge Knapp carefully examined each of these contentions and found them to be without merit.

A. *The Saratoga Meeting*

Plaintiffs' approach is perhaps best exemplified by their treatment of NYRA's annual Saratoga meeting, traditionally held in August. Without benefit of record citation, plaintiffs' claim that "for sheer lavishness, social standing and extravagance this meet is without equal in the United States" (Pl. Br., p. 20). Plaintiffs' complaint concerning

the annual race meeting at Saratoga is that NYRA trustees and Jockey Club members like to race there and thus (although they have offered no proof that this is so, or that "others" do *not* like to race there) it is a prime example of the type of alleged "favoritism" which plaintiffs seek to establish.

In the first place, the question of who "likes" to race at Saratoga is, as the court found (522a), irrelevant. The New York Racing Law (Unconsol. Laws § 7972) requires NYRA to hold 24 days of exclusive racing each year at Saratoga "unless the governor determines that a sufficient emergency exists for reducing such number of days. . . ." The only emergency which has ever shut down Saratoga was World War II, and even at the height of last winter's gasoline shortage Governor Wilson declared that a shutdown was "inconceivable", adding:

> "Saratoga is the traditional 'home' of thoroughbred racing, not only for New York but for the nation. . . ." (New York Times, January 18, 1974, at 30, col. 1).*

NYRA's corporate policy is to put on the same quality racing program at Saratoga as is put on at Belmont and Aqueduct (198a, 213a-214a, 254a, 259a) despite the fact that Saratoga, as a result of its geographical location, draws smaller crowds which bet less money than those at the down-state metropolitan tracks (169a). Thus, the purses paid to horsemen at Saratoga are comparable to those paid at NYRA's other tracks. It is this fact which apparently leads plaintiffs to charge that the Saratoga meeting is "a treat which The Jockey Club/NYRA trustees

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* The well-known sportswriter, Steve Cady, has also written in the New York Times:

> "[Saratoga] probably comes as close as any track in the nation to presenting racing the way it should be presented." (*Ibid*) (119a)

give themselves at the expense of the other horsemen who race in this State" (Pl. Br. p. 20).

Thus, with no citation of authority and no proof at trial, plaintiffs claim that "the Jockey Club/NYRA trustees are the ones primarily interested in stake racing", and then go on to charge that "the proportion of money paid out to stakes compared to overnights at Saratoga is also *exorbitant by all usual standards*" citing to pages 114a-115a, 197a, 199a, 267a of the Appendix (Pl. Br. p. 33) (emphasis added). In the first place, plaintiffs' string of record cites have nothing whatsoever to do with percentage of total purse moneys allotted to stake races as opposed to overnight races,* but at best concern the relationship between total purses and the size of the handle at Saratoga—a totally different thing. Most importantly, HBPA's own annual racing statistics demonstrate the utter falsity of its charge. Saratoga's percentage of monies allocated to stake races, far from being "exorbitant by all usual standards," is according to HBPA's own statistics, frequently exceeded by such leading tracks as Hollywood Park and Santa Anita in California, Washington Park in Illinois and Gulfstream Park and Hialeah in Florida (587a-594a).

On the question of the relationship between total purse moneys paid and NYRA's share of the handle, plaintiffs' position seems to be that NYRA should relate purses to

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* Basically, there are two types of races run at thoroughbred racetracks: stake races and "overnights". Stake races are open on an equal basis to all horses upon payment of a nomination fee and can pay substantially higher purses than "overnights" (121a, 123a). Stake races are usually traditional races that have been run annually for a number of years (260a, 67a) such as The Belmont Stakes, The Kentucky Derby and The Travers. "Overnights", which comprise the bulk of the racing program, are restricted to a certain group of horses which meet the conditions set for the race (122a-123a). These races are called "overnights" because horses can be entered in them the night before the race.

handle on a track-by-track basis, rather than an overall corporate basis, so that at each track total purses would come to the present statutory figure of 3% of handle.* Given the fact that attendance and handle are much lower at Saratoga than at Belmont or Aqueduct, this would inevitably mean that the purses paid at Saratoga would have to be a fraction of those paid at the downstate tracks and would relegate Saratoga to a small-time status (167a-168a). And this is apparently what plaintiff Karlinsky wanted. He compared Saratoga to Rockingham Park, a small New Hampshire track about 35 miles from Boston, and suggested that Saratoga put on a similar "moderate program of racing" (428a-431a). However, Mr. Lawrence, plaintiffs' other horseman witness, was of a different mind:

> "Q. Mr. Lawrence, let me ask you this, as a horse owner and trainer: would it be your preference to see the purses at Saratoga held down to 3 percent of the handle at Saratoga?
>
> "A. No, it wouldn't" (391a).

Yet, as we shall see, when it came to offering proof of damages, plaintiffs' only proffer was a mathematical computation by an accountant as to what additional amounts the two named plaintiffs would have earned at Aqueduct and Belmont had the alleged "excess" purse money paid at Saratoga been paid out instead at the other two tracks, so that at each track the purses paid were the same percentage of handle, *i.e.*, 3% currently or less in earlier years (444a-445a, 480a *et seq.*), precisely the result Mr. Lawrence testified he would not want to see happen at Saratoga.

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* Had the New York legislature wanted to make purses relate to handle on a track-by-track basis it could easily have done so. Instead, the legislation speaks in terms of the racing association (not each track) paying out a given percentage of its handle. (Unconsol. Laws § 7960(c)).

The frivolous nature of plaintiffs' further arguments with respect to Saratoga are readily apparent from consideration of each instance of so-called favoritism which they allege. Thus, they argue that the heavy emphasis on two-year old racing is a sign of self-favoring by defendants. However, as Mr. Hyland, one of the three Stewards at NYRA, testified, Saratoga has been always noted for 2-year-old races because it is the time of year (August) when the 2-year-olds reach maturity (168a-169a).

Next is plaintiffs' argument that defendants exhibit favoritism by not paying horsemen's vanning costs to Saratoga, although NYRA pays vanning costs between Aqueduct and Belmont (Br., p. 21). The simple explanation for the situation at Aqueduct and Belmont is that there are not enough stalls at either track to house all the horses competing there; regardless of which track is operating (they alternate), horses stabled at the other track which are entered in a race must be vanned the short distance between the two tracks for the day of the race, then vanned back (314a-315a, 160a). At Saratoga there is no such day-to-day vanning problem (315a). And, as Judge Knapp brought out in his questioning, when horses are shipped outside New York, it is the owner who pays the expense.

Finally, it is indeed curious that plaintiff Karlinsky, although testifying that his reasons for not racing at Saratoga were economic (431a-432a), had raced horses in England, Ireland and France (*Id.*), as well as Maryland, Kentucky, New Jersey, Delaware, Massachusetts, New Hampshire, Illinois, Ohio and Michigan, and regularly shipped his stable between Florida and New York (436a-437a). Even more curious is the fact that although Mr. Karlinsky never applied for a stall at Saratoga, he attended the races there every year between 1960 and 1970

(423a). Apparently, Saratoga is an attraction with wider appeal than just to the alleged "racing elite".

B. *Stall Allocation*

Stalls are provided by NYRA to trainers on a complimentary basis (66a). There are far more horses seeking to race than NYRA can accommodate (162a). Applications for stall space are made three times per year prior to each race meeting (89a), *i.e.*, before the spring meeting at Aqueduct and Belmont; before the summer meeting at Saratoga; and before the fall meeting at Aqueduct and Belmont (66a), on forms provided for that purpose (161a-162a). The object is, of course, to allot stalls to the best horses (177a-178a). The trainer must list *each horse* he intends to bring to the track and its type (claiming, allowance or stake; sex, and age) (464a). The racing secretary reviews the stall applications not only trainer by trainer, but horse by horse (468a). Most trainers (including those who train horses owned by the defendants)* obtain fewer stalls than they apply for (67a).

At the trial, plaintiffs presented a statistical study purporting to show that NYRA trustees and Jockey Club members taken as a group had a higher percentage of their stall applications granted than did other horsemen taken as a group.** No evidence was offered that any plaintiff (or

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* Many horses owned by Jockey Club members and trustees of NYRA are trained by trainers who also train horses owned by other horsemen (67a, 89a-90a).

** Here, as throughout, plaintiffs made no effort to differentiate between Jockey Club members, who total some 75 in number, and NYRA trustees. For all that plaintiffs' statistics show, and, from all that appears in the record, it is entirely possible that NYRA trustees had on the average fewer of their stall applications granted than did other horsemen, the alleged discrepancy being due to treatment afforded Jockey Club members who are not NYRA trustees. No basis appears in the record for plaintiffs' effort to treat NYRA trustees and Jockey Club members as fungible.

indeed any other horsemen) had ever been denied a stall unfairly (520a) or that any NYRA decision with respect to stall allocation was unfair (523a-524a). Instead, plaintiffs relied solely upon statistical evidence introduced through the testimony of an accountant, Mr. Friedman, which purported to show that 88% of stalls requested by trainers who train exclusively for Jockey Club members or NYRA trustees were granted, as against 73% of those requested by trainers who train exclusively for other horsemen (575a).* Plaintiffs apparently considered this evidence of a statistical difference in the percentage of stall applications granted to NYRA trustees and Jockey Club members, on the one hand, and other horsemen, on the other hand, as evidence of a *per se* violation of the antitrust laws.

However, putting aside what the law may be, Judge Knapp found that plaintiffs' statistics were entirely explainable by the plaintiffs' own concession that Jockey Club members and trustees tend to have the better quality horses (520a). This admission alone would suffice to dispel plaintiffs' apparent argument that the only thing that can explain the slight disparity among the figures is the fact that certain trainers work for Jockey Club members, a theory which presupposes that all horses are equal—or at least should be treated equally in the allocation of stalls.

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* In conducting his statistical study, Mr. Friedman first defined three groups of trainers: those who trained exclusively horses owned by trustees of NYRA or members of the Jockey Club; those who trained exclusively horses owned by people who are not any of the above; and those who trained horses owned by both groups ("mixed trainers") (472a). The Friedman study was limited to a comparison of stall allotments (and frequency of stall use) for the first two groups—no data was compiled for the mixed trainers (473a). The statistics were based on an average of the data for the three-year period 1967-69, ending five years prior to trial (472a). Plaintiffs offered no witnesses to interpret the figures.

Further, Judge Knapp relied (526a) on direct evidence in interpreting plaintiffs' statistics. Mr. Noe, NYRA's present racing secretary, who had previously been employed as racing secretary at Hialeah Racetrack in Florida (where plaintiffs could not contend that defendants are part of any "inside" group receiving preferential treatment) testified that in 1971, the last year he was racing secretary at Hialeah, there was an almost identical difference between the percentage of stall applications granted at Hialeah (81% "Jockey Club" v. 67% "Others") as there was in New York (88% "Jockey Club" v. 73% "Others") (467a-468a). As the court stated:

> "There are racetracks all over the country over which the trustees of the New York Racing Association as such have no jurisdiction or influence at all; and there is not a scintilla of evidence that things work any differently in those places than they do here" (526a).

There is little need to discuss in detail here any of plaintiffs' other statistics, such as those purporting to show the number of horses starting out of each stall granted to each group during the allocation periods. Presumably plaintiffs' argument is that Jockey Club and Trustee trainers participate less frequently in relationship to the number of stalls they are assigned, and, therefore, favoritism is shown (Pl. Br., pp. 16-17). However, as Mr. Noe testified, a "cheaper horse" will run more often than a better horse (469a), and plaintiffs conceded that Jockey Club members and trustees have the better horses.

Perhaps nothing better demonstrates the pique out of which this action was brought than plaintiffs' allegations concerning two-year-old horses. Stripped to its essentials, plaintiffs' argument is that NYRA's mere failure to have a rule, unlike some racetracks elsewhere, restricting the

number of two-year-old horses on their grounds constitutes an antitrust violation (Pl. Br. pp. 17-18). Plaintiffs argue that the purpose of such a rule is to "enable a satisfactory program to be presented and filled" (Pl. Br. p. 17). However, there was never any testimony that NYRA has at any time failed to present and fill a satisfactory program. Further, plaintiffs do not even try to argue that failure to prohibit two-year-olds directly benefits the defendants, but that it merely tends to benefit "the type of owner (the 'affluent owner') such as the trustees of the NYRA . . ." (Pl. Br. p. 17). Quite a few of the members and officers of HBPA have two-year-olds at NYRA racetracks (353a-354a, 390a). Indeed, it was plaintiffs' own witness, John Lawrence, an HBPA member, who testified under direct examination by plaintiffs' attorney that at the time of trial both of his stalls were occupied by two year-olds and that neither had raced (392a).

C. *Stake Races*

Like plaintiffs' other claims of favoritism and abuse of power by the trustees, their amorphous claim that somehow (never specified) the stake program is devised to favor NYRA trustees and Jockey Club members is completely without foundation.* During the trial, plaintiffs made absolutely no attempt to prove that the percentage of purses allocated to stake races at NYRA's tracks was in any way excessive or out of line with the general practice in the industry. The only proof submitted as to general industry practice was offered *by defendants* (587a-594a) in the form of computations of percentages of total purses allocated to stake races at the major race tracks throughout

* It must be emphasized that trustees and Jockey Club members own both stake and non-stake horses, and that some own no stake horses at all. Furthermore, by no means are all of the best stake horses owned by the defendants (67a).

the country for the years 1965-1972. Far from showing that NYRA allocates a disproportionate amount of money to stake races, the computations show clearly that NYRA's practices are completely consistent with the allocation practices of major tracks throughout the country. In fact, in only one of the relevant years, 1966, did any NYRA track have the highest percentage allocation to stake races.

D. *Programming of Races*

As with their other allegations, it is difficult to determine the gravamen (if any) of plaintiffs' charges relating to the programming of races, but their grievances seem to lie in a contention that in some unspecified way the trustees exert improper influence on the Racing Secretary to set the conditions of races (*e.g.*, distance, surface (dirt or turf) and weight carried in handicap races) in such a way as to favor their own horses. No one can quibble with the obvious fact that some horses run better on grass than turf (and vice versa) or that some horses are better suited to running long distances than others. Nor can anyone quibble with the equally obvious fact that the weight a horse carries affects his performance. Aside from these assertions of the obvious, plaintiffs have utterly failed to even offer, much less prove, any connection between the programming and handicapping of races and any alleged benefit conferred thereby on the trustees of NYRA or the members of the Jockey Club.

The trial demonstrated that there is no connection between the types of horses owned by a horseman and his status as a trustee or non-trustee or his membership or non-membership in The Jockey Club (263a, 311a-313a, 409a). Trustees and Jockey Club members own all types of horses; turf horses and dirt horses, sprinters and distance horses. There is no such thing as a "typical" trustee

or Jockey Club stable (312a). This being the case, it is logically impossible for races to be programmed in such a way as to favor trustees or Jockey Club members, for if the Racing Secretary were to schedule more races for, for example, distance horses, he would be favoring those horses in an individual's stable that are better at distances while, at the same time, disfavoring horses *in the same stable* that are not good distance horses. Furthermore, even if an individual trustee had in his stable only horses of one type (and this doesn't happen except possibly in the case of very small stables (306a)), the Racing Secretary could not act in such a way as to favor that individual without, at the same time, disfavoring other trustees and Jockey Club members. Judge Knapp noted that:

> "there has never been from any witness *even a suggestion* that *any* track decision was erroneous or unfair." (524a)

This failure was also conceded by counsel for plaintiffs:

> "The Court: . . . Mr. Karlinsky did not suggest any track situation that he ever thought of was unfair, nor did he mention the subject matter, nor did any of your other witnesses, including Mr. Lawrence who is in a more clear sense your witness, even suggested that there had been an unfair track decision, and I am sure had there been any evidence to that effect you would have produced it.
>
> Mr. Moss: I certainly would." (524a-525a)

Plaintiffs Offered No Proof of Damages

It is a fundamental principle of antitrust law that Congress "bestowed the right to sue only on such persons as might be injured in their business or property *by reason of* anything forbidden in the antitrust laws." (*SCM Corp.*

v. *Radio Corp. of America*, 407 F.2d 166, 171 (2d Cir.), *cert. denied*, 395 U.S. 943 (1969)). Ignoring the necessity for showing injury, plaintiffs totally failed to prove any injury or damage.

Thus, despite all the arguments and statistics concerning stall space, there was no testimony that any plaintiff ever asked for stall space and failed to receive it (520a). Despite all the contentions made about the programming of races and handicapping of horses, there was no showing that any plaintiff had ever lost a race or had been unable to enter a race because of some improper ruling or decision. As just noted, plaintiffs' counsel expressly conceded in response to Judge Knapp's questioning that he could not produce "even a suggestion that any track decision was erroneous or unfair".

The only aspect of their case upon which plaintiffs even attempted to prove the existence of damages was with respect to their contention about the Saratoga meeting. Here, plaintiffs simply put in a mathematical computation based upon the winnings of plaintiff Karlinsky and plaintiff Jacobson at Aqueduct and Belmont. The computation purported to show how these winnings would have been augmented had the alleged "excess" purse money paid at Saratoga been added instead to the purse structure at Belmont and Aqueduct.*

However, as we have previously noted, plaintiffs' notion that anything over and above 3% of the handle allocated to purses at Saratoga constituted an "excess" was expressly

* This computation failed to take into account the fact that Mr. Jacobson had won purses at Saratoga and was one of the recipients of the alleged "excess" (486a-487a). It also assumed that NYRA's receipts at Saratoga would have remained constant even though purses paid there were reduced to a point where Saratoga's ability to attract top-flight horses would be open to serious question.

rejected by plaintiffs' witness, Mr. Lawrence, who testified under cross-examination that he, as a horse owner and trainer, would not want to see purses at Saratoga held down to 3% of the handle.

POINT II

The District Court Properly Denied Plaintiffs' Class Determination Motion.

A. *The Court correctly ruled that the motion was untimely under FRCP Rule 23(c)(1)*

It is obvious that affirmance of the District Court's dismissal of plaintiffs' action on the merits would render moot and unnecessary any consideration of the issue of denial of class action status. *O'Shea* v. *Littleton,* 414 U.S. 488 (1974). It is clear, however, on the record and on plaintiffs' own admissions that the District Court was eminently correct in concluding that plaintiffs had failed to comply with the requirements of FRCP Rule 23(c)(1):

> "The plaintiff has delayed four and one-half years in making his motion, and has only moved after a pretrial conference. There has been no showing that this motion could not have been made at an earlier date. Rather the delay here appears to have been caused solely by the failure of plaintiff to properly adhere to the mandates of Rule 23(c). Under such circumstances, this court finds that plaintiff has failed to meet the 'as soon as practicable' test of the Federal Rule, and his motion is therefore denied." (Opinion of Knapp, J., p. 71a)

The original complaint in this action was filed in September 1969, almost four and one-half years prior to plaintiffs' motion for class determination. The complaint was dismissed on the ground that it was "a meandering, dis-

organized, prolix narrative" and was "so confusing and out of focus that it constitutes a poor foundation for the commencement of a lawsuit which involves complicated problems under the antitrust laws. . . ." (Opinion of MacMahon, J., March 20, 1970, at 4, 5).

Plaintiffs filed an amended complaint on April 8, 1970, not long before the widely-publicized local Civil Rule 11A formally became effective. The District Court dismissed the amended complaint as to two defendants, and sustained the amended complaint which it found remained "less than a model of the pleader's art. . ." (52 F.R.D. at 44) as to the remaining defendants.

Discovery was pursued by plaintiffs over the next two and one-half years. Plaintiffs never moved for an order declaring their alleged class action to be maintainable. Finally, on October 19, 1973, Magistrate Jacobs stated in a letter to counsel that "there has been an inexcusable delay in the prosecution of this action" and directed that pretrial memoranda be filed by November 30, 1973, which was done. Still there was no Rule 23 motion from the plaintiffs.

The action appeared on the court's Reserve Calendar on January 10, 1974. Although defendants argued in their Pre-trial Memorandum that the action could not proceed as a class action because plaintiffs had never moved for an appropriate order, no motion was made. The court convened a pre-trial conference on February 21, 1974 for the purpose of fixing a trial date. When the court raised the question of whether this was a class action, plaintiffs initially took the position that there was still no need for them to move for a class action determination prior to trial. After some discussion, plaintiffs finally agreed to make the required motion. This, of course, was on the eve of trial and would, if granted, have necessitated further delay of a

case thus nearly five years old, while proper notice was given to the class.

Despite all the rhetoric in plaintiffs' attorneys' affidavits presented to Judge Knapp,* they concede all that needs to be known in order to affirm his denial of the motion. Thus, it was conceded in Mr. Moss' affidavit that "it is true that it [the motion] could have been" made previously (52a); that "perhaps [it] even should have been made earlier" (*Ibid.*); that plaintiffs "should have" brought on "a formal motion sooner" (*Id.* at 54a); and that the "Magistrate's discussion of our attitude as 'casual' is not entirely unjustified. . . ." (*Ibid.*) Given these admissions, it is no wonder that plaintiffs' argument before this Court contains only one citation to their own moving affidavits and none to any other portion of the record.

The excuses proffered first to Judge Knapp (41a-60a), and now to this Court for plaintiffs' conceded lack of diligence were, as Alice would have said "curiouser and curiouser" and alone justify his denial of the motion. Thus plaintiffs once again present the following excuses (Pl. Br. pp. 42-43):

1. "The propriety of this as a class action was raised by defendants before Judge Lasker, who decided it in plaintiffs' favor." (Pl. Br. p. 42)

The notion that Judge Lasker (who merely sustained the amended complaint before him on the motion to dismiss and before whom there was no other motion) determined this to be maintainable as a class action is simply absurd. Plaintiffs cite no portion of Judge Lasker's opinion (52

* Affidavit of Jesse Moss, Esq., sworn to March 1, 1974 (41a); Affidavit of Sue Caplan, Esq., sworn to March 5, 1974 (57a).

F.R.D. 40 (S.D.N.Y. 1971)) and one searches the opinion in vain for any mention of class action status or satisfaction of any of the requirements of Rule 23(b).

2. "Thereafter the question of whether this case was properly brought as a class action was raised before the District Court under local Rule 11(A) and the Court rejected the applicability of the rule." (Pl. Br. p. 42)

Plaintiffs cite no portion of the record nor the moving affidavits to support this assertion, nor do they even identify the district judge. The chronology suggests, however, that they are referring to consideration of discovery motions by Judge Motley in 1971. Plaintiffs conceded below, however, (59a) that Judge Motley "made no specific determination with respect to Rule 23."

3. "This question of class action was subsequently brought up before the magistrate, who ruled that Rule 11(A) was not applicable here, but no separate consideration or ruling was given at that time, to Rule 23." (Pl. Br. p. 42)

Here, plaintiffs are obviously referring to pre-trial conferences before Magistrate Jacobs held on May 2, 1973 and December 12, 1973 (59a-60a). It is a measure of plaintiffs' inability to adequately represent the interests of the alleged class that they have persistently sought to characterize defendants' view, expressed consistently throughout the pendency of the action that *Rule 23* required plaintiffs to move expeditiously as an argument that we were trying to apply *local Rule 11A* retroactively.

4. "[A]n effort was made to get a pre-trial order drawn and signed and plaintiffs submitted one which in-

> cluded a statement of this as a class action. Defendants objected to a pre-trial order at that time . . . it was decided that the parties could not agree . . . and it was dispensed with by the magistrate without objection from either of the parties." (Pl. Br. pp. 42-43)

The fact that plaintiffs' proposed pretrial order "included a statement of this as a class action" obviously did not make it a class action. The rules and the cases require not the submission of a recitation of class action status (which would merely repeat the allegations of the Complaint) in a pretrial *order* but of a *motion*, on proper probative papers, in order to obtain a class action determination. Thus, defendants' refusal to "cooperate" in such procedure hardly excuses plaintiffs' failure to follow the proper procedure.

5. "Presumably the Rule 23 order could have been made on the basis of discussions with the magistrate, without the making of a formal motion." (Pl. Br. p. 43; 55a)

We do not know whence plaintiffs could have gotten such an impression. Certainly not from the defendants—for defendants consistently and repeatedly took the position that a formal motion was required. Certainly not from Rule 23—which expressly requires the court to rule by order on the class action issues. *Carracter* v. *Morgan*, 491 F.2d 458 (4th Cir. 1973); *Adise* v. *Mather*, 56 F.R.D. 492 (D.Colo. 1972); *see Sunrise Toyota, Ltd.* v. *Toyota Motor Co.*, 55 F.R.D. 519 (S.D.N.Y. 1972); Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 39-40 (1967).

Thus, it is abundantly clear from the above that Judge Knapp was correct in concluding that plaintiffs' still unexplained 4½ year delay in making their class action motion was due solely to their failure to adhere to the mandates of Rule 23(c) and that no showing had been made that the motion could not have been made prior to completion of discovery, the filing of pretrial memoranda and the placing of the case on the trial calendar. Under the circumstances of this case, the District Court's reliance on *Taub* v. *Glickman,* 14 Fed. Rules Serv.2d 847 (S.D.N.Y. 1970) was entirely warranted. There, as here, a delay of over 3 years was unexcused, and only the placing of the case on the court calendar prompted the motion for class determination. *See also Adise* v. *Mather, supra,* 56 F.R.D. 492 at 495 ("The motion was not timely filed and *for this reason* should be denied.") (emphasis added)

Plaintiffs' own moving papers not only failed to provide a single reason why the motion was not practicable until the eve of trial, but actually *conceded* that it could have been made long before. The complaint in this action alleged a conspiracy for "a period of over 10 years" (*i.e.,* since at least 1960). Further, defendants showed that between the filing of the action and the making of the motion, *six* of the individual defendants died. *See Kravitz* v. *Callen,* 67 Civ. 3446 (S.D.N.Y., Feb. 9, 1971), where the action was alleged to be a class action but plaintiffs did not move under Rule 23 "as soon as practicable." ("Prejudice may be presumed, however, where as here, the acts complained of occurred as far back as 1960 and 1961 and where at least some of the witnesses have since died.") (Opinion, p. 9)

In short, there was ample proof before the District Court that plaintiffs' delay was not only inexcusable, but willful. Plaintiffs conceded that they could and *should* have moved at an earlier time, having moved on the eve of trial only

because the court required them to. They were not ignorant of the requirements of Rule 23(c); indeed they ignored defendants' repeated urgings that they make their motion. There was no question that they had inexcusably delayed prosecution of the action. Given the above, the District Court's determination that the delay was "caused solely by the failure of plaintiff to properly adhere to the mandates of Rule 23(c)" (71a) was entirely justified.

B. *Assuming, arguendo, that plaintiffs' class motion was timely, it would have had to be denied on the other grounds set forth in Rule 23*

Even though the District Court's decision denying plaintiffs' class determination motion was based upon its untimeliness, plaintiffs persist in rearguing the merits of that motion here. Just as the remainder of the plaintiffs' brief is oblivious to the fact that a trial was had, plaintiffs' class action argument is utterly devoid of all but the most cursory citations to their moving papers below or to any other part of the record.

Individual Questions Predominate

The most glaring fallacy proffered by plaintiffs is the notion that all horsemen (trainers and owners) possess identical interests, and are necessarily engaged in a "group activity" (Pl. Br. pp. 36, 39). Analysis, however, of the three areas of abuse alleged by plaintiffs (allocation of stall space, allocation of purse money, programming of racing opportunities) demonstrates that racing is a highly individualistic activity, with the interests of the horsemen every bit as competitive and disparate as the horses they raced.

1. *Allocation of Stalls*

As previously discussed (*supra,* pp. 22-25) NYRA provides *complimentary* stall space at its tracks (66a). Trainers are invited to submit applications at various times of the year for stall space on forms provided by NYRA (89a, 161a-162a). There are many more applications than there is stall space, necessitating a selection process (162a). The object of this process is, of course, to allot stalls to the best horses (177a-178a). Most trainers (including those who train horses owned by defendants), obtain fewer stalls than they apply for (67a). Moreover, many horses owned by defendants are trained by trainers who also train horses owned by members of the alleged class (67a, 89a-90a, 472a).

In view of these indisputable facts, it is rather difficult to conclude that applying for stall space is a "group activity" or that the racing secretary's allocation of stalls has the identical impact on all horsemen. Simply put, to prove that he has been abused a horseman would have to show that his particular horse that was denied space was actually more deserving than the particular horses owned by defendants which were assigned space. Such proof is inherently unique and personal to each horseman.

2. *Allocation of Purse Money and of the Programming of the Races*

Plaintiffs claim that purse money is misallocated because too high a percentage of the total purse money is assigned to stake races as compared to non-stake races. This is an abuse of monopoly power, say the plaintiffs, because the defendants own a greater proportion of stake horses than do horsemen who are not defendants. Here again, it is impossible to generalize in this fashion. While there may be defendants who own many stake-quality horses, there are

defendants who own few or, at various times since 1960, none at all (67a). Conversely, there are horsemen who would be members of plaintiffs' class who own (and have owned) far more stake horses than the defendants and who have won far more stakes purses than the defendants (67a). The alleged abuse of devoting too much purse money to stake races, therefore, assuming there is any such abuse, would not affect all class members equally—some it might affect significantly, and some (those who own stake horses) would actually benefit. Further, it is the personal judgment of the owner or trainer whether to call a horse a "stake" horse and enter him in a stake race; often two trainers will disagree as to whether a particular horse is of "stake" caliber (68a, 121a). The issues are clearly individual, not typical or common.

3. *Damages*

It is a measure of their desperation that plaintiffs insist on arguing the existence of damage issues in their class action discussion, even though at trial they never requested monetary relief either for misallocation of stalls or programming of racing opportunities. Indeed, the only monetary damage claim (to the extent that plaintiffs' damage theory is comprehensible at all) is for the so-called "diversion" of funds to pay "exorbitant" purses at Saratoga (Pl. Br. p. 47). Furthermore, as previously noted (*supra*, p. 20), the only two members of the "class" who were called to testify for plaintiffs (Karlinsky and Lawrence) were in complete disagreement in their views as to how purses should be allocated to the Saratoga meeting.

It is precisely these damage and individual "impact" questions which distinguish this case from the case so heavily relied on by plaintiffs, *Berman* v. *Narragansett*

Racing Ass'n, 414 F.2d 311 (1st Cir. 1969), where the court found that "the track had no liability to individuals; only to the owners as a group," *Sherman* v. *H&R Block, Inc.,* 354 F. Supp. 1405, 1406 (E.D. Pa. 1973).

4. *The HBPA*

There is absolutely nothing in the record to indicate that this action "would not have been taken in the first place, without the desire of a majority of the class which we are discussing" (Pl. Br. p. 37). In the first place, it is elementary antitrust law that an association lacks standing to assert antitrust claims on behalf of its members, or even on its own behalf where it has suffered no direct injury nor shown that it was in the target area of the actions of the defendants,* *Nassau County Ass'n of Ins. Agents, Inc.* v. *Aetna Life & Cas. Co.,* 497 F.2d 1151 (2d Cir. 1974). Second, there is nothing in the record to indicate that any vote was ever taken by horsemen to support the HBPA's actions nor of any other sign of their assent. Certainly the trial gave no indication of any support at all. Only two non-defendant horsemen were called by plaintiffs. One, plaintiff Karlinsky, had been absent from racing in New York until shortly before the trial since the action was instituted (434a). Plaintiff Jacobson never testified, and plaintiff Hatcher had disappeared long before (see note "**" p. 3, *supra*). There was hardly what could be characterized as a "stampede" of horsemen at trial to testify to the existence of any of plaintiffs' alleged abuses.

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* At trial, the court found that no evidence was adduced on the allegations of direct injury to plaintiff HBPA contained in ¶ "FORTY-FOURTH G." (29a-30a) of the Amended Complaint (526a-527a).

The Plaintiffs Cannot Fairly and Adequately Protect the Interests of the Class

Even assuming, *arguendo,* that a proper class exists and that plaintiffs have established that fact, we submit that inadequacy of representation is amply demonstrated in this case by numerous factors, including the plaintiffs' lack of diligence in allowing over four years to go by without seeking a class action order despite defendants' constant prodding that they do so, the Magistrate's conclusion that plaintiffs inexcusably delayed prosecution of their action, the unexplained disappearance of one of the plaintiffs, Harry M. Hatcher, and the voluntary decision of another plaintiff, Mr. Karlinsky, to drop out of racing for several years while the suit was pending in view of his "SEC problems."

As shown above, it is clear that plaintiffs' counsel were prepared to go to trial without ever seeking a class determination (55a). Moreover, plaintiffs' counsel mistakenly advised the court that no notice need be sent to the class members whose interests they claimed to represent (50a). Indeed, plaintiffs still "presume" that a Rule 23(c) order can be made on the basis of informal "discussions with the Magistrate without the making of a formal motion. . . ." (Pl. Br. p. 43; 55a), although Rule 23(c)(1) clearly provides that "*The Court* shall determine by order whether it is to be so maintained. . . ." (emphasis added) and, as Professor Moore states, "The language is mandatory." 3B J. Moore, *Federal Practice* ¶ 23.50 at 23-1101 (2d ed. 1974). This is not the kind of conduct which should be expected of a would-be fiduciary for "thousands" of absent parties.

As the court held in *Mersay* v. *First Republic Corp.,* 43 F.R.D. 465, 470 (S.D.N.Y. 1968), the primary criterion in determing whether plaintiff and his counsel will fairly and adequately represent the class "is the forthrightness and

vigor with which the representative party can be expected to assert and defend the interests of the members of the class. . . ." No such expectations could be entertained here. In *Philpot* v. *Philco-Ford Corp.*, 63 F.R.D. 672 (E.D. Pa. 1974), the court observed

> "A full and precise understanding of the Federal Rules of Civil Procedure will surely escape even the most erudite attorney if he chooses not to read them.
>
> * * *
>
> "Plaintiffs and counsel for plaintiffs have absolutely no justification for their recklessly casual disregard for the procedural responsibilities they owe to the defendant, to the Court, and to the class they purport to represent." (*Id.* at 674)

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Dated: New York, New York
January 20, 1975

Respectfully submitted,

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IRA A. FINKELSTEIN
JAMES SKELLY WRIGHT, JR.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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RAYMOND E. KARLINSKY, et al., :

Plaintiffs-Appellants, :

-against- :

THE NEW YORK RACING ASSOCIATION INC. et al., : AFFIDAVIT OF SERVICE

Defendants-Appellees. :

- - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

ROBERT R. CAWTHRA, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 20th day of January, 1975, I served the annexed BRIEF FOR DEFENDANTS-APPELLEES upon Jesse Moss, Esq. attorney for appellants by delivering two copies thereof to his offices at 743 Fifth Avenue, New York, New York .

Robert R Cawthra

Sworn to before me this 20th
day of January, 1975.

Notary Public

DAVID G. MORROW
Notary Public, State of New York
No. 31-4514749
Qualified in New York County
Commission Expires March 30, 1975

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